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Articles

POLICE DISCLOSURE TO THE FAMILY COURT AND THE USE OF SPECIAL ADVOCATES: UNCHARTED WATERS

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It is common practice in public law children proceedings, where there have been, are or are likely to be, criminal proceedings involving one of the parties to invoke the Police Family Disclosure Protocol and subsequently seek a direction against the police for disclosure of information in its possession to the court. The process can often be protracted and it is the experience of many practitioners that the police are often reluctant to be forthcoming with information when an investigation is ongoing. In *Re T (Wardship: Impact of Police Intelligence)* [2009] EWHC 2440 (Fam), [2010] 1 FLR (forthcoming, but see comment by Professor Douglas in [2010] Fam Law 19), Mr Justice McFarlane addressed the unusual situation of the Metropolitan Police Service (MPS) voluntarily involving itself in wardship proceedings with information that it did not want disseminated to the parties. This proved to be uncharted waters and led to the use of special advocates for what is believed to be the first time in a family court.

There are in essence two ways the court can approach the issue of public interest immunity (PII). Traditionally, the procedure has been adopted (more often in the criminal courts) whereby the court has reviewed the material sought to be withheld in private with the assistance of the party or interested person seeking to withhold the material from disclosure. The judge then considers the material and rules on first whether the material is relevant and secondly in the event that it is relevant, on the balance of interest in favour of disclosure. Thereafter, disclosure is made where appropriate and the matters are kept under review by the judge in the course of the substantive proceedings. In the special advocate procedure the 'closed material', ie that material that has been withheld from disclosure to the party can be seen, tested in cross examination and submissions made upon by the special advocates and where necessary can be ruled upon in a 'closed judgment'.

THE BACKGROUND

Re T (above) involved a child of nearly 3 years who had, for much of his life, been in the care of his father and paternal grandparents in India, following abduction by them from his mother's care in July 2004. During T's absence he was made a ward of court. In mid-2006 T, his father and the grandparents returned to England and were eventually traced by the authorities with the consequence that T was returned to his mother's care. The father was remanded in HM Prison at Wormwood Scrubs pending trial for the criminal offence of child abduction. The father and the grandparents lodged applications for contact and residence of T. On 15 December 2006, at the first directions hearing, the MPS, unbeknown to the other parties apart from the guardian, passed information to Mr Justice Hedley that there was 'credible evidence' to the effect that the father had taken out a contract on the mother's life to

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be carried out on the day of the hearing on her attendance at court. The judge was informed that the mother and T had been placed into police protection. From December 2006 until the conclusion of the fact finding proceedings in August 2008 the court was concerned with the information that had been disclosed to the court and its procedural consequences, which involved the first case in the family jurisdiction in which special advocates have been used.

The case was highly complex and greatly benefited from judicial continuity with Mr Justice McFarlane from an early stage. Essentially, the case highlights the clash of culture between the police and the family courts and their respective aims, objectives and duties which were at times incompatible.

The father was not charged with any offence for the alleged contract to murder as there was insufficient evidence to support such a charge; instead on 13 December 2007 the father was given a 'reverse Osman' warning (a reference to *Osman v UK* (1998) 29 EHRR 245, [1999] 1 FLR 193) which essentially cautioned the father that if anything untoward happened to the mother he would be the prime suspect. The MPS objected to any direct contact between the child and the paternal family on the basis that it would compromise the safety arrangements put in place for the mother and T. The MPS disclosed information to the court upon which it relied to substantiate its position, but refused to disclose the information to the parties other than the basic information that there was a contact to kill (this basic information was not disclosed until 2 February 2007, nearly 2 months after the initial disclosure to the court). The MPS asserted PII in respect of the information it held on grounds that it fell into one or other of the following categories: because it related to internal MPS procedures, protection arrangements for the mother and T and/or the identity of informants.

The MPS regarded the threat to the mother to be credible and as a consequence, regardless of the lack of criminal prosecution, the mother and T were going to remain in police protection. Save for the first hearing before Hedley J the MPS were always represented by counsel at court but were not made a party. Except for the basic information regarding the contract to kill the MPS resisted any of the relevant material being disclosed to the father or his legal advisers despite numerous requests for it to do so on behalf of the father at the directions hearings. As a consequence the paternal family's contact applications were frustrated by the MPS position and a stalemate ensued until 10 May 2007 when McFarlane J grasped the nettle and directed that a request be made to the Attorney General to consider the appointment of 'special advocates' to assist in managing the disclosure process. Following a positive response form the Treasury Solicitors Office on 18 June 2007 Sumner J appointed a special advocate for the father and a special advocate for the paternal grandparents.

A special advocate represents 'the interests of' a party, as opposed to representing that party as counsel usually does. In *Re T* the special advocates were briefed by the party they represented, which included seeing the lay client in conference, but thereafter received disclosure of all of the evidential material, both 'open' (ie disclosed fully to the party and his legal team) and 'closed' (not disclosed to the party or his legal team). The role of the special advocate was to achieve the disclosure of as much of the closed material into the open proceedings and to represent the interests of the paternal family at closed hearings with the MPS, which all the other parties were excluded from.

GUIDANCE

In his insightful and ground breaking judgment, Mr Justice McFarlane described the procedure involved, the lessons to be learned and gave valuable guidance on the use of special advocates in family proceedings which the President of the Family Division has advised that pending any further guidance from the Family Criminal Interface Committee should be followed. He stated at para [111]:

> 'In closing I propose now simply to list the procedural and other observations that arise from the body of this judgment so that they may be of use should another court encounter a similar set of difficulties in the future:
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> i. Full disclosure to the court of all

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material relevant to the allegation and its investigation at the earliest possible stage;

ii. Disclosure, again at the earliest stage, to the open parties of as much of the police material as is not rendered confidential by PII;

iii. Thereafter, establish a process, again at the earliest stage, to evaluate the PII claim and, if appropriate, arrange for the disclosure of further material to the open parties either in a full, gisted or redacted form;

iv. In parallel, full disclosure to the police of as much of the family proceedings evidence as is not rendered confidential by PII;

v. Thereafter a cooperative process between the police and the family court whereby reasonable requests for further police investigation are considered and implemented;

vi. The family court should consider providing a clear explanation to the police of the differing priorities and processes that drive the family court proceedings in contrast to those which may apply to the processes of a police investigation and the criminal justice system. For example, an early explanation that in the family proceedings, disclosure of material that is relevant to an assertion made by police is not dependent upon a party to the family proceedings putting forward a 'defence case'; the material is discloseable (initially to the court) in any event;

vii. In the same context, the police should be reminded of the responsibility upon an applicant for relief, who provides information to the court in the absence of other parties whose interests may be affected, to give a balanced, fair and particularised account of the events leading up to the application and the matters upon which it is based;

viii. Consider, at an early stage, requesting the Attorney General to appoint a special advocate for the

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party to whom full disclosure of sensitive, but highly relevant, material may not be made;

ix. In cases of particular difficulty it may be appropriate to consider whether the police should be joined as a party to the proceedings (and not simply act as a witness as in the present case) so that they may be more directly subject to the direction of the court. This is a matter that may require careful consideration if, as here, the police are not making any application for relief;

x. Following disclosure of material to the 'open' parties, those parties should be tasked with identifying any further investigation that they may suggest is necessary so that a request for such investigation can be made for the police to consider undertaking well before the fact-finding hearing;

xi. At the start of this process, the court should establish a procedure and practice for the case which supports 'open' and 'closed' sessions. This is likely to involve separate 'open' and 'closed' files, separate hearings where different teams of advocates are present and, from time to time, the giving of both 'open' and 'closed' judgments;

xii. The court would be wise to consider at an early stage the question whether, and if so, which party should 'prosecute' an allegation/assertion which is or may be based upon material which remains partially 'closed';

xiii. In the above context, consideration may be given both to the role of the guardian ad litem and/or to seeking to draw the local social services authority into the case by means of a direction under s 37 Children Act 1989;

xiv. Plainly, it is essential that there should be judicial continuity throughout the PII process.'

The guidance given in this case will be of wider interest than family practitioners as it highlights the stark differences in the approach to issues of disclosure by the family and criminal jurisdictions and the complexities relating to the standard of proof. The court was critical of the stance of the MPS in not agreeing to disclosure. The court asserted its authority as the arbiter in determining whether evidence or information should be disclosed to a party once PII is relied upon as a reason for non disclosure. It was not for the MPS, or a party or third party, to decide what should, and what should not, be put before the court. The case is also highly pertinent in terms of the tension between protecting a party's absolute right to a fair hearing in accordance with Art 6 of the ECHR (and the right to family life pursuant to Art 8) and protecting another individual's right to life in accordance with Art 2. The court undertook the fine balancing act required to ensure that each parties' convention rights were upheld. In order to conduct this balance and determine what the welfare of the child concerned requires the court must have all the information available, and it is incumbent on those asserting PII to provide that information to the court. It is of note that through the special advocate procedure, and without the need for the court to rule on the issue, the MPS agreed to disclose approximately 90% of material that it initially asserted was subject to PII which the judge found to be on an 'ill informed or otherwise erroneous basis' (para [35]). The process had taken 11 months and the delay in the context of this young child's life was regarded by the court as 'highly damaging': Mr Justice McFarlane stated at para [35]:

> 'Given the fact that the MPS in the end voluntarily agreed to disclosure of the great bulk of its material as a result of proper evaluation, the reasonable inference must be that its original stance of asserting PII and refusing to disclose any material must have been taken on an ill-informed or otherwise erroneous basis. The cost of the disclosure process and the enormous delay that it caused are serious matters in themselves, but when viewed against the effects of that delay on the life of this child and his immediate family the position of the MPS can only be seen as highly damaging. As a direct result of the police intervention, this child had been removed from a situation of having 24 hour a day

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contact with his father and grandparents to one of no contact with them at all. At the conclusion of the court process, the court was to be asked to reinstate contact between them. Whatever the ultimate decision of the family court on the issue of contact, it was in the interests of the child and each family member to get to the position of making that decision at the earliest possible stage. As CA 1989, s 1(2) says 'any delay in determining [any question with respect to the upbringing of a child] is likely to prejudice the welfare of the child'. For an arm of the State to create a standstill in proceedings relating to a child by informing the court of the contract to murder allegation and then to take 11 months deciding not to contest the disclosure of much of the material that it held was, from the point of view of the welfare of the child, totally unacceptable. It demonstrated neither an understanding of, nor a respect for, the priorities of the family court. What was needed, from the family court's perspective, was a cooperative and facilitative approach.'

THE IMPACT ON INTERIM CONTACT

At an interim hearing on 27 November 2007 (*Re T (Wardship: Review of Police Protection Decision) (No1)*) the court determined (with the support of the mother and guardian) that highly supervised direct interim contact between T and his paternal family should take place, but this was thwarted when the MPS subsequently asserted that if the direct contact took place the protective arrangements would be withdrawn which resulted in the mother and the guardian no longer supporting direct contact. Consequently the direct contact order was revoked on 1 February 2008 (*Re T (Wardship: Review of Police Protection Decision) (No2)*). In his judgment Mr Justice McFarlane said at para [43]:

> 'I therefore concluded that the interim contact decision fell to be reconsidered against the background of the fact that (absent any proceedings in, and orders of, the Administrative Court) the police would indeed withdraw protective measures in the event that direct contact took place. Against that background the guardian reluctantly altered her recommendation to one that advised against any direct interim contact. Having reviewed the matter, and having T's welfare as the paramount consideration, I concluded that the loss of police protection, at that 'early' stage prior to the fact finding hearing, was just too high a price to pay for a few interim direct contact sessions. I therefore revoked the earlier order and sanctioned only the continuation of indirect contact by way of videotape and photographs.'

EVALUATION OF RISK AND THE DIFFERENT OBJECTIVES AND DUTIES OF THE MPS AND THE COURT

The MPS's position was to provide protection to the mother pursuant to its statutory duty under the Serious Organised Crime and Police Act 2005, Part 2, Chapter 4 which applies to (amongst others) anyone who is, or has been, or might be a witness in legal proceedings (whether or not in the UK) [SOCPA 2005, Schedule 5]. The police, acting as 'a protection provider' under the Act may make such arrangements as they consider appropriate for the protection of such a person if the police consider 'that the person's safety is at risk' by reason of being a witness or a potential witness. As far as the MPS was concerned its duty was to protect the mother and T on the basis of the information received and its own risk assessment.

The approach of the MPS in respect of the evaluation of risk contrasts with the approach of the family court. In order for the family court to determine whether it was in T's best interests to have contact with his paternal family it had to make a determination of the risk including, amongst other things, whether the father had sought to have the mother killed on a balance of probabilities. Consequently the court conducted a fact finding hearing on the issue of whether there was a contact to kill. Even when the 'open' information was coupled with that which remained 'closed' the court concluded that on the binary system (in accordance with *Re B*) within which the family court operates the allegation that the father contracted with

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another to murder his wife was not proved. Mr Justice McFarlane stated at para [71]:

> 'The family court, working on the basis that an allegation is either proved, on the balance of probability, or not so proved, adopts a binary approach (as described by Lord Hoffmann in *Re B (Children)* [2008] UKHL 35) with the result that an allegation that is not proved is removed from the factual matrix on the basis that it did not occur. There is, as Lord Hoffmann says, no room for a finding that the alleged event 'might have happened'. When the court moves on, therefore, to seek to evaluate any future 'harm which [the child] . . . is at risk of suffering' (CA 1989, s 1(3) (e)), the court cannot consider any potential for harm if that potential is based on the unproven allegation (*Re B (Children)* above, and *Re M and R (Child Abuse: Evidence)* [1996] 2 FLR 195).'

However, the outcome could have been different. What if the material available to the judge in the closed sessions was of such weight and significance that on a balance of probabilities the 'closed court' found that the contract to kill the mother was proved in accordance with *Re B*? This would lead to the extraordinary situation that the father would effectively be found to have contracted to kill the mother without knowing the basis upon which the finding was made and without being able to properly challenge the evidence within the open proceedings. This scenario highlights the unusual situation of the judge in the family court being in possession of information denied to the parties despite its highly prejudicial effect on the father. It also highlights the difference between the family and the criminal courts as it is highly unlikely that the disclosure of such important evidential material would be denied to a defendant in a criminal trial and if disclosed may result in the prosecution offering no evidence. Offering no evidence is not an option that is open in family proceedings. However the scenario emphasises the fact finding role of the judge in the family court and raises questions regarding the compatibility of the judge sitting in both open and closed session with a party's Art 6 rights for a fair hearing. In *Re T*, as is set out in para [110] of the judgment, due to the risk of the fact finding judge becoming in some manner 'contaminated' or placed in a conflicted position by the exposure to material during the early PII/disclosure process, the court arranged for an alternate fact-finding judge to be kept on stand-by although how this would work in practice was not fully explored; in the event it was not necessary.

CONCLUSION

The invaluable guidance offered by the court in Mr Justice McFarlane's insightful judgment for use in future proceedings is to try to avoid the protracted litigation and the difficulties experienced due to the clash of culture that exists between the police and the family justice system. He stated at paras [106] and [107]:

> 'The central observation that this court makes at the conclusion of this most lengthy and at times highly frustrating process, has been well trailed throughout this judgment and relates to the unhelpful clash of cultures or, at the very least, lack of understanding that exists between the police and the family justice system. It may be entirely understandable from the internal perspective of each of these two arms of the state, but the fact that it exists has delayed, and at times risked thwarting, the discharge of this court's duty to act in a manner which meets the overall welfare needs of its ward. Whilst the police are plainly not under an overt legal 'duty' to assist the wardship court in these circumstances by investigating the case in a manner that goes beyond what is required for police processes, I do believe that once the police have delivered highly significant information to the wardship court, which the court is obliged to analyse and assess in order to undertake its own risk and welfare evaluation, the police must have some responsibility (albeit with a small 'r') or obligation actively to assist the court in that process.
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> In the circumstances I would urge some extra-curial consideration to be given to how issues such as the present may be addressed more efficiently and cooperatively in the future so that other

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families and other courts do not face the unnecessary difficulties encountered here.'

At the final hearing the court in *Re T* found, for reasons other than the alleged threat to kill, that there should not be direct contact between T and his paternal family. Had the court determined in favour of direct contact it is likely to have culminated in a stand off between the MPS and the family court, the family court having determined that there was no contract to kill yet the MPS continuing to implement protective measures on the basis of 'credible evidence' that there was a contact to kill. The MPS may have returned to its original position and asserted that the protective measures would be withdrawn if direct contact took place. What remedy then? Possibly proceedings in the Administrative Court to challenge the validity of the MPS decision to place the mother and child into police protection based on its own internal risk assessment; alternatively proceedings to challenge the removal of the protective measures if direct contact was to take place. That would inevitably involve the Administrative Court considering the closed and open information, the comparative risk assessments conducted by the MPS and the family court and, again, the open parties being denied the key evidence relied upon. There remains a tension between the decision of the Court, on a balance of probabilities, that the contract to kill did not happen and the risk assessment of the MPS upon which the mother is placed in police protection and the consequences that flow from those decisions in relation to what is determined to be in the child's welfare.

The Attorney General maintains a discretion when deciding whether or not to appoint special advocates. In considering how to exercise that discretion, the usual process is for the court to write to the Attorney General, making a request for her to consider appointing a special advocate, and setting out the reasons why the court considers it requires the assistance of a special advocate. The Court of Appeal judgment in *Murungaru v SSHD and others* [2008] EWCA Civ 1015 sets out the various factors the Attorney General will take into account.

It will remain to be seen how often the special advocate procedure needs to be invoked in family cases. A feature of *Re T* was that the initial information came from crimestoppers via an informant in the prison where the father was on remand. The mother was informed of the allegation and placed in protective custody for her own protection. In other cases the source of the information may be from the person placed in police protection and as a consequence that person will be the primary source of the evidence. It is hoped, in the light of the judgment in *Re T* and the guidance given, delays caused by disclosure issues can be avoided in other cases.

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